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Board of Trustees of Washington County Water Conservancy District v. Keyston Conversions, LLC : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

BOARD OF TRUSTEES OF WASHINGTON COUNTY WATER CONSERVANCY DISTRICT, Petitioner/Appellee/Cross Appellant, v. KEYSTONE CONVERSIONS, LLC, a Utah Limited Liability Company, Respondent/Appellant/Cross Appellee.	Case No. 20030457-SC 010501616 (3)
KEYSTONE CONVERSIONS, LLC, a Utah Limited Liability Company, Plaintiff/Appellant/Cross Appellee, v. The WASHINGTON COUNTY WATER CONSERVANCY DISTRICT, an independent special district of Washington County, Defendant/Appellee/Cross Appellant.	

RESPONSE AND REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY, STATE OF UTAH.
HONORABLE G. RAND BEACHAM

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES

STATUTUES & RULES

III. ARGUMENT

A. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S JUDGMENT THAT THE DISTRICT'S FINAL RULES IMPOSE AN IMPACT FEE.

In this matter, there are two questions presented: (1) whether a special district's fee that is required as a condition of putting in a water system—in this case for a possible subdivision—is an impact fee even though the special district itself does not grant subdivision approval, but does give written authorization to approve the water system; and (2), whether that fee, if it indeed is an impact fee, loses its character as an impact fee if it is collected by a municipality—in this case Toquerville City—in connection with written subdivision plat approval by the municipality. The trial court below said yes to both questions, determining that in the first instance the fee would be an impact fee, but in the second instance, because the fee was collected by a municipality, the special district did not give "written authorization" in connection with development approval within the meaning of the statute and therefore the fee was not an impact fee. See R. 193-195; see also Utah Code Ann. § 11-36-102(4).

As to the first question, the trial court agreed with the argument of Respondent's counsel as explained by him at the October 18, 2001 hearing. R. 357, T. 29:12—31:17.[1] The trial court rejected Petitioner's argument that installation of a water system does not in and of itself create a greater demand for public facilities, R. 357, T. 24:19-23, and therefore is not approval of a development activity. The trial court reasoned:

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[1] For the Court's convenience, copies of the cited portions of the transcript are attached as Exhibit 1.

> The District [Petitioner] bases much of its argument on the fact that it does not encourage developers to apply to it for secondary water service and that any such application is "voluntary." The District emphasizes that it will not even accept an application without proof that the applicant has been refused service by the "community" in which the applicant's property is located. Neither of these arguments is material to the issue presented to the Court, however. The District's Petition prays for the Court to determine whether the District's Final Rules impose impact fees, without reference to Keystone or any other particular applicant. The District's ability to reject an application because, for example, the applicant has not been refused service by his community, does not mean that the availability fee that the District may have imposed is or is not an impact fee. If the Final Rules do improperly impose impact fees, the problem is not corrected by the District's insistence that its system be the developer's "last resort." Consequently, the Court's determination in this case must assume that someone has applied or will apply to the District for service under circumstances which require the District to make a decision about the application. (emphasis in original).

R. 191, 192. Based upon that assumption that someone will apply for service, which assumption again was made in the context of a Petition by the District for declaratory relief, and following Keystone's argument the trial court said:

> Keystone first argues that the availability fee is an impact fee because (i) the District, which is a local political subdivision, owns and operates a secondary water system, which includes public facilities for "water supply, treatment, and distribution," and (ii) Keystone's construction of a "subdivision secondary water system" is "construction or expansion of a . . . structure . . . that creates additional demand and need for public facilities" and is, therefore, a development activity, (iii) the District requires Keystone to obtain the District's written authorization, or development approval, before commencing construction of a secondary water system for Keystone's property if it is to be connected to the District's system, and (iv) Keystone must pay the District's availability fee as a condition of obtaining the District's development approval.

R. 192, 193.

The Trial court agreed with Keystone that its "construction of the secondary water system on its own property creates additional demand and need for public facilities." R. 193. Accordingly, the District's "availability fee," as reasoned by the trial court, is an impact fee as defined in Utah Code Ann. § 11-36-102(7). In its Responsive Brief, however, the District now argues that the Trial court lacked adequate facts upon which to base its rulings—both of them—and that the trial court's reasoning is not sound.

MATERIAL FACTS

The material facts properly in the record can be summarized as follows:

1. Petitioner "at all times relevant hereto has been a political subdivision of the State of Utah . . . existing . . . by virtue of Utah Code Ann. § 17A-2-1401 et seq. and is located in Washington County, Utah." R. 1. ¶ 3.

2. The District owns and manages a secondary water system (the "System") which presently supplies secondary irrigation water to residents of the Town of Toquerville pursuant to an Agreement for Joint and Cooperative Action by and between the District, the Town of Toquerville, and the Toquerville Irrigation Company dated December 28, 1998. The System is capable of providing wholesale irrigation water within the towns of LaVerkin and Toquerville (the "LaVerkin Creek Area")." R. 2, ¶ 5.

3. The District's primary method of providing water is as a wholesaler to municipalities. R. 2, ¶ 4. This it does by written contracts with the municipalities. R. 357, T. 26:24, 25. No impact fee analysis is done. R. 357, T. 26:21-27:18.

4 The District does not concern itself with the price the municipalities in turn charge developers for its water. R. 357, T. 14:13-16 ("We [the District] primarily

provide water to municipalities. And then they go on and do whatever business they do with it. We primarily do that by way of contractual arrangements and the like."); R. 357, T. 27:14-18.

5. In selling water to municipalities under contract, the District does not believe it is bound by any provision for reasonableness under the impact fee statute or even this Court's analysis in Banberry Dev. Corp. v. South Jordan, 631 P.2d 899 (Utah 1981). Rather, in setting the price for the water, because it is based upon contract, it believes that its only duty "in passing this fee under [the] water district statute is to be rational. . . .We [the District] can't be so irrational that it would be appropriate for a court to come in and substitute its judgment for the judgment of our court [board]." R. 357, T. 27:23-28:3.

6. At some point, "it became apparent to [the District] that Keystone Development would be likely coming to the District rather than to TSWS[2] to obtain secondary. . . water service." R. 357, T. 15:12-15. This was probably because Keystone claims it has an agreement with the District directly to provide water—at least the District admitted that that was the basis for the District's putting together its Rules, creating its availability fee, and then filing the present Petition with the District Court. R. 357, T. 35:13-17, 36:19, 20.

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[2] TSWS—Toquerville Secondary Water System—is an entity that deals with delivery of secondary water through a secondary water system to residents of Toquerville, composed of a board with two members appointed by the District, two members appointed by the City, and a fifth member appointed by the four existing members. It is based upon a contract for delivery of water between the District and the City of Toquerville. R. 357, T.

7. Regardless of the reason why the District sought judicial approval of its fee, the District nonetheless filed its Petition attaching a copy of its rules, seeking "a Section 1442 'judicial examination and determination' pertaining to its availability fee, regardless of who applies to it for service." R. 193 n.2; see also R. 1-4.

8. Respondent, Keystone, is a property owner and developer within the City of Toquerville and "is required to have a secondary water system in place in order to obtain subdivision development approval from Toquerville." R. 190. Petitioner does not object to this finding by the trial court. Brief of Appellee, at 35.

9. If Keystone does not purchase secondary water directly from the District, it will purchase water from TSWS or Toquerville to develop its property. R. 357, T. 13-15. In that event, it will pay a fee for the water in connection with receiving written subdivision approval. This fee is based upon the contract the municipality has with the District. No impact fee analysis is done. The District "provide[s] water to [the] municipality[]. And then they go on and do whatever business they do with it." R. 357, 14:14-15.

Based upon these facts the trial court concluded that the fee "somebody" would have to pay if they purchased water directly from the District was an impact fee under the statute. The Trial court's legal conclusions were correct. "Public facilities" within the meaning of the Impact Fee Act, "means . . . capital facilities that have a life expectancy of ten or more years and are owned or operated by or on behalf of a local political

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14:20-15:10. It receives its water from the "System" referred to in paragraph 5 of the District's Petition. R. 2 ¶ 5.

subdivision . . . [involving] water rights and water supply, treatment, and distribution facilities." Utah Code Ann. § 11-36-102(12). The District's "System" referred to in paragraph 5 of its Petition, is a public facility. See also R. 357, T. 9:25-10:1, 20:15-18, 22:17-24.

Moreover, the District itself is a "local political subdivision" within the meaning of the Impact Fee Act because it is a "special district created under Title 17A, Special Districts." Utah Code Ann. § 11-36-102(8)(a). See also Material Fact No. 1 above.

Construction of a "structure, or use, [or] any change in use of . . . a structure" as required by the District's Rules, see R. 7 ¶¶ 3, 6, 8, 9, 10, "that creates additional demand and need for public facilities" is a "development activity." Utah Code Ann. § 11-36-102(3). The trial court correctly concluded that the construction of a secondary water system to meet the District's specifications was a development activity within the meaning of the Impact Fee Act. "Even if the District had so much existing service capacity that it could absorb new connections without expanding its system, any construction of new subdivision facilities which were to be connected to the District's system would create additional demand on the District's system." R. 193 (emphasis in original). Hence, the District's Rules regulate a "development activity."

Finally, the District will not allow connection to its system unless it inspects and approves construction of the system "during installation." R. 11 ¶ 10. This will only take place if the applicant signs a water application and agreement with the District. R. 8 ¶ 3. Hence, the District's Rules provide for "development approval" within the meaning of the Impact Fee Act. Accordingly, the trial court correctly concluded, if the District

supplies water directly to "somebody" rather than to a municipality, and collects a fee consistent with its Rules attached to its Petition, that fee is an impact fee because it is "a payment of money imposed upon development activity as a condition of develoment approval." Utah Code Ann. § 11-36-102(7)(a). Regardless how the Petitioner would have this Court look at the facts in light of the Impact Fee Act, the availability fee imposed by the Petitioner directly upon "someone" other than a municipality is an impact fee. The trial court was precisely correct in its legal analysis and conclusion regarding the first question presented. Accordingly, the trial court's decision as to the first question presented should be affirmed.

Now, by way of specific response to some of the arguments made by Petitioner in its Brief, whether Keystone's Trial Memorandum and its exhibits are admissible as evidence or not makes little difference in light of the Material Facts outlined above. The parties did not present evidence at the hearing on October 18, 2001, except by way of proffer, because the parties at the hearing did not believe "the evidence . . . [was] in dispute." R. 357, T.12:22. The trial court took the proffers of counsel along with argument. That forms the basis of the record on appeal. Further, it is somewhat disingenuous for Petitioner to argue that Respondent's Trial Memorandum should have been ignored by the Court. Petitioner's counsel responded to the points raised in it throughout Petitioner's presentation. See e.g., R. 357, T. 16:25, T. 17:21, 22, T. 18:9, 10, T. 23:23, 24, T. 25: 8-15. Moreover, for what it's worth, the Trial Memorandum was not late as the trial court suggested. This was a hearing on a Petition, not a motion hearing requiring courtesy copies to the court beforehand. A trial memorandum was not

even required, but was submitted strictly to assist the trial court. And indeed, the trial court did rely on the Trial Memorandum. R. 190 ¶ b.

Notwithstanding, given the Material Facts summarized above, which are entirely supported either by the Petition or by proffers from Petitioner's counsel, the "facts" in the Trial Memorandum are unnecessary. Nevertheless, if this Court finds that reference to those facts is needed and that they are not properly in the record, this Court should remand this matter with specific instructions regarding the legal issues raised in the Petition. See Bair v. Axiom Design, L.L.C., 2001 UT 20, ¶ 22, 20 P.3d 388; Bakanowski v. Bakanowski, 2003 UT App. 357, ¶15, 80 P.3d 153. Respondent will have little difficulty entering into evidence the contracts, city ordinances, etc., that are exhibits in the Trial Memorandum.

In addition, the District claims that "[n]othing in Keystone's unfounded allegations suggest that there might be even one connection to the District's system, much less enough applicants to impact that system." Brief of Appellee at 38. The Trial court flatly and properly rejected that argument. R. 191, 192. Keystone does not need to prove that there will be a connection. The fact that someone will connect to the District's system must be assumed otherwise the District's Petition is pointless. They are asking this Court to tell them that their rules which set forth the conditions for water use and connection to their system, are not impact fees, and now they say this Court and the trial court cannot assume someone might get their water? Why is the District filing a Petition with the trial court, seeking a declaratory ruling, if there is no chance of "even one connection to the District's system?" Brief of Appellee at 38.

The District attempts to bog this Court down in a debate over whether or not "a 'need' would be created for the District to add more facilities to its system" and whether or not the Trial court's Ruling could support such a finding. This debate is entirely beside the point. The issue is if "someone" connects to the system. This "someone" connecting to the system has already been anticipated by the District and is the very purpose of the District's Rules and Petition being filed.[3]

The District is simply talking out of both sides of its mouth attempting to confuse this Court. The fact is its availability fee clearly falls within the definition of an impact fee and the trial court's conclusions in this regard should be affirmed.

B. THIS COURT SHOULD DECLARE THE DISTRICT'S PASS-THROUGH FEE AN IMPACT FEE BASED UPON THE RECORD BEFORE IT; BUT IF NOT, THIS COURT SHOULD REMAND TO THE TRIAL COURT WITH INSTRUCTIONS ON THE LAW SPECIFICALLY AS IT RELATES TO A PASS-THROUGH FEE.

1. A Pass-Through Fee is an Impact Fee.

With the first question presented having been answered in the affirmative, namely, that the District's fee charged directly to someone requesting service from its system as more particularly described in its Rules, is an impact fee, then the next question becomes relevant: Does that fee change its character if it is collected by a municipality instead of the District in connection with subdivision approval?

This issue was squarely raised below by Keystone. See Keystone's Complaint, copy attached to Appellant's blue brief as Exhibit 1, e.g., ¶¶ 16, 32-34, 40 n.7; see also R. 64-68; R. 357, T. 59:15-60:9. Further, this point was argued extensively by Petitioner.

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[3] Even by the District's own admission, this "someone" is probably Keystone. R. 357, T.

R. 357, T. 16:22-17:2, 26:17-27:5, 69:6-70:20. Moreover, the Trial court ruled on this issue and reasoned as follows:

> Keystone's alternative argument is that (i) Toquerville will not approve Keystone's subdivision activity unless Keystone has a secondary water system; (ii) the District has the only secondary water system from which Keystone could obtain service, (iii) the District will not allow Keystone to obtain service unless Keystone pays the availability fee, and (iv) the statutory definition of "impact fee" as one imposed "as a condition of development approval" does not require that the fee be demanded by or paid to the body giving the development approval. This argument does not appear to be sound. If Keystone's "development activity" is the subdivision generally, and if Keystone must apply to the District for service because no other such service is available and that service is a condition of Toquerville's approval of Keystone's subdivision, the District's approval of Keystone's application is a necessary predicate to Toquerville's approval of the subdivision but it is not a "written authorization . . . that authorizes the commencement of development activity" and, therefore, the District's approval is not "development approval." Even though, contrary to the District's argument, the District's approval of an application for secondary water service does affect the municipality's subdivision development approval, it does not constitute "development approvel" which would make the District's availability fee constitute an impact fee. (footnote omitted).

R. 194, 195. The Trial court compared this fee to a fee a developer would pay for a "contractor's license and a business license in order to obtain Toquerville's approval of the developer's subdivision" and stated that that "would not mean that the fees paid to the State Division of Occupational and Professional Licensing for the contractor's license and to the Town Clerk for the business license are 'impact fees.'" R. 194 n.3.

The facts relied upon by the Trial court in the above analysis were included in the record. Fact no. (i) was not objected to by Petitioner in its brief. Brief of Appellee at 35.

36:19, 20.

As to fact no. (i), it is not necessarily in the record that the District has the "only" secondary water system, but it does have a system, Material Fact nos. 2, 6 and 8, and as the trial court said: "the Court's determination in this case must assume that someone has applied or will apply to the District for service under circumstances which require the District to make a decision about the application." R. 192. Fact no. (iii) above is apparent from the District's Rules attached to its Petition. R. 7 ¶ 4. Finally, fact no. (iv) is a mere recitation and analysis of the Impact Fee Act. No evidentiary support is needed. Accordingly, this argument is not unsupported in the record. Neither is it based upon unreasonable assumptions as Petitioner would suggest.

In its analysis, however, the trial court was plainly in error. The fee for a contractor's license or a business license is unlike the fee paid for the District's water: it is not paid as a condition or using the Trial court's words "a necessary predicate" to subdivision plat approval. R. 194. The developer has only one reason for paying the fee to Toquerville for the water: obtaining secondary water so his subdivision will be approved. A developer might have a myriad other reasons for obtaining a contractor's license or a business license that may never involve subdivision plat approval. Again, "Toquerville will not approve Keystone's subdivision development activity unless Keystone has a secondary water system." Fact no. (i) above. R. 194. Approval of the subdivision, including the water system therein, is a "development activity" within in the plain language of the Impact Fee Act. Utah Code Ann. §§ 11-36-102(3) and (12). "Written authorization from a local political subdivision" includes written authorization from the "municipality," i.e., Toquerville. Utah Code Ann. §§ 11-36-102(4) and (8).

Moreover, this fee is unlike what would be paid to a utility company although installation of the utilities and connection to their service may likewise be a condition for subdivision approval. Utilities are carefully regulated by the state. Their fees are monitored. Further, they are not "local political subdivisions" within the Impact Fees Act. Utah Code Ann. § 11-36-102(8)(a). Consequently, an analogy to a utility company is inapposite.

Nothing in the Impact Fees Act, and Petitioner has pointed to nothing, suggests that the local political subdivision that authorizes the development activity must be the same local political subdivision that imposes conditions that govern the development activity. Nothing in the Impact Fees Act requires that the local political subdivision collecting the fee cannot do so on behalf of the local political subdivision that imposes conditions that govern the development activity. Local political subdivisions collect fees for each other frequently, such as the case of a municipality and a special service district, while at the same time, it is the service district that regulates the particular development activity, e.g., special service districts for sewer or water. Petitioner recognized this at the hearing before the Trial court. R. 357, T. 69:6-70:20. Moreover, an example of this is in the statute itself. Utah Code Ann. § 11-36-202(8). The statutory definition of an impact fee merely refers to a "condition of development approval" with no reference to who sets the conditions.

Accordingly, this Court should rule that the answer to the second question presented is that a fee paid as a condition of development approval does not lose its

character as an impact fee even though it is collected by another local political subdivision.

Petitioner may argue, as it did before the trial court, that Keystone will not be coming to the District for secondary water because the District fulfilled its contract with Keystone by implementing the TSWS. Keystone must come to TSWS to receive its water. See R. 357, T. 36:13-17, 19, 20. First, in response to that argument, that fact if it were true, is immaterial to the District's Petition. This Court, as did the trial court, must assume that someone will be coming to the District for secondary water. Second, even assuming that fact to be true, the District cannot side step the requirements of the Impact Fee Act because it sets its fee by contract with municipalities and "then they go on and do whatever business they do with it." See Material Fact No. 4 above. Nothing in the Impact Fees Act states that the fee paid to the local service district must be pro rated to what the municipality received for the water. As long as the Petitioner receives a fee for its water and the use of its system, and as long as that water and system is a condition of obtaining subdivision plat approval, the fee collected from the developer is an impact fee.

Indeed, the District has been charging municipalities in Washington County for its water and use of its system for some time. R. 357, T. 26:22-25, 27:17,18. Such a pass-through fee, according to the District, "would not be an impact fee under the terms of the Impact Fees Act." Brief of Appellee at 15. Accordingly, the District believes it can and indeed has charged whatever it felt appropriate for its water, Material Fact No. 5 above, without complying with the impact fees analysis or even the requirements articulated by this Court in Banberry Dev. Corp. v. South Jordan, 631 P.2d 899 (Utah 1981). This

contract fee is then paid to the District and nobody is the wiser. See e.g., R. 301 ¶ 2; R. 303 (Ron Thompson, the District's manager, see also R. 357, T. 9:19-11:4, is "particularly concerned that the Town [of Toquerville] has not implemented the agreement by adopting the schedule of impact and other fees required by the agreement and may have approved additional hookups to its system without properly notifying the WCWCD and submitting the agreed upon fees. In regard to Calvin Lowe's subdivision the Town is obligated under the agreement to pay the District a $1,500 water connection fee for each lot in the subdivision within six months after approval of the subdivision plat.") and compare R.117 ¶ f and R. 125. Nothing in the plain language of the Impact Fee Act would suggest that a local political subdivision does not need to comply with the act if it collects its fee from the authorizing political subdivision by contract. Whether Keystone or "someone" pays the fee to the District directly for its water and use of its system in connection with subdivision plat approval, or whether they pay the fee to a municipality that gives it to the District pursuant to a contract, the fee paid is an impact fee.

2. THIS COURT SHOULD CONSIDER ALL THE FACTS IN THE RECORD INCLUDING THE FACTS AND EXHIBITS SET FORTH IN KEYSTONE'S TRIAL MEMORANDUM; IN THE ALTERNATIVE, THIS COURT SHOULD REMAND THIS CASE WITH INSTRUCTIONS "TO POINT OUT, AND ADDRESS, ISSUES WHICH MAY BECOME MATERIAL ON REMAND." BANKANOWSKI V. BANKANOWSKI, 2003 UT APP 357 ¶15.

The record at the trial court level evinces that all parties, including the trial court, were confused as to the procedure required by Utah Code Ann. § 17A-2-1442. R. 357, T.

5:8-11, 8:14 through 9:3[4], 7-10. Prior to the Trial court's ruling, there was confusion as to what the procedure was for hearing the District's Petition. Utah Code Ann. § 17A-2-1442 appears to say that the District files its Petition, gives notice, and then anybody who wants to can show up for the trial, without any indication of an opportunity for discovery or depositions. In the case at hand, Keystone was the only one who showed up to the hearing. Notice of Petition and Hearing was sent out on August 15, 2001, and the trial against all unknown entities or persons took place on October 18, 2001. R. 31-32. With only nine weeks from petition to trial on such complicated matters, there is no time for all affected persons and entities to find and hire counsel, file answers and conduct discovery and depositions. If all of these basic rights normally afforded to Respondents/Defendants do not exist under Utah Code Ann. § 17A-2-1442, then the trial court cannot be said to have erred by considering Keystone's trial memorandum and accompanying exhibits.

At the trial before the trial court on October 18, 2001, both parties made reference to and arguments based on the exhibits attached to both the petition and the trial memorandum. Neither party objected to the other party's referencing of these exhibits, and neither party specifically moved to have said exhibits admitted into evidence. See R. 357. T. 16:25, 17:21, 22, T. 18:9,10, T. 23:23, 24, T. 25;8-15, T. 29:12-31:7. The District now claims there is no foundation for Keystone's exhibits. If this is the case, the same holds true for the exhibits in the District's Petition. The District argues that their exhibits are acceptable because they were attached to a verified petition, even though no

[4] Even though this quote is attributed to the District's counsel, it appears that it is actually the trial court speaking at some point. Keystone believes that began on page 8, line 14.

foundation or testimony was given at the hearing, but that Keystone's Trial Memorandum exhibits should not be considered, even though Keystone was at the hearing and prepared to lay foundation for the documents. The District cannot have it both ways. To follow the District's argument would force this Court to conclude that the entire trial court proceeding would have to be thrown out and the parties should then go back to square one for a new trial. If this Court does find such to be the case, this Court should remand with specific instructions on Section 1442 so all parties and the trial court know what procedure to follow under this statute.

Clearly the trial court was troubled by the nature of the proceedings. Thus it was not in error for the trial court to consider all possible scenarios and reasonable hypotheticals as to how someone might come to the District for water under its rules—either directly "just because" or directly in connection with subdivision approval through a municipality. The trial court, in evaluating Keystone's trial memorandum and exhibits did not have to believe the facts to be true or authentic, but merely whether they raise a reasonable scenario that may arise when deciding on a judgment of a declaratory nature.

Keystone, being the only entity to "appear and demur," suggested that the trial court continue the matter. "And so, as far as between us, we would prefer to continue the matter until the court has time to review the trial memorandum until the court has time to be more prepared to go through and see what we have here." R. 357, T. 6:23-7:1. Nevertheless, the trial court proceeded and Keystone still prevailed in defeating the District's petition. It is simply unfair for the District to say now what Keystone "should have" or "could have" done at the hearing, when the District and trial court did not know

the proper procedure. Keystone followed the statute, in that it any "owner of property in the district or person interested in the contract or proposed contract may appear and demur to or answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court." Utah Code Ann. § 17A-2-1442.

Finally, section 1442 states that the "court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties." (emphasis added). Keystone is uncertain as to what this is supposed to mean, but if there was any irregularity by the trial court's later considering Keystone's Trial Memorandum, then perhaps the trial court doing so falls under this section. The District's "substantial rights" were not affected by the trial court's later considering Keystone's Trial Memorandum once the trial court better understood the process, or lack thereof, pursuant to the statute.

Regardless of what the trial court did or did not consider, Keystone believes that this Court can affirm the finding of an impact fee in that the only requirements was for the trial court to look at the District's Rules, look at the Impact Fee Act, and determine whether there was an impact fee. The trial court did so, and the District failed to convince the trial court that its availability fee was not an impact fee.

In addition to the Petition, the District also submitted Final Rules and Regulations for Secondary Retain Water Service for the La Verkin Creek Area, and the Availability, User & Standby Fee Analysis for the Washington County Water Conservancy District – La Verkin Creek Irrigation System. R. 7-30. Based on the Petition and these documents alone, the trial court could have determined that the fees to be imposed were impact fees

under the Impact Fees Act given that the District has admitted that "Keystone is required to have a secondary water system in place in order to obtain subdivision development approval from Toquerville Town." Brief of Appellee p. 35.

Finally, the record clearly shows that the trial court conferred with counsel in an off the record discussion to work out the facts in the trial court's mind. R. 185. It was after this discussion that the trial court issued its Ruling.

In the event this Court concludes that the record before it is inadequate, it should remand this case with instructions to the trial court addressing both questions presented: First, what does the Impact Fee Act require for an impact fee if Keystone comes directly to the District for water under the District's Rules, and second, is that fee still an impact fee if Keystone comes to the District for water as a condition of subdivision approval, when the approval is granted by a municipality. Further, and thirdly, because the District has made clear that it sells water to municipalities by contract—throughout Washington County, R. 26:22-25, R.27:17, 18—and that it washes its hands then of the fee the municipality charges (which argument is somewhat disingenuous given the Lowe Affidavit, R. 300), and because that is an issue that affects most if not all residents of Washington County and a recurring issue, this Court has a duty to address this issue on remand as well.

Citing this Court's decision in Bair v. Axiom Design, L.L.C., 2001 UT 20, the Utah Court of Appeals, when dealing with an issue that was certain to resurface on remand said:

> Because this issue is certain to resurface on remand and because the parties cite the inclusion of savings alimony as a recurring topic in alimony disputes, we will address whether savings/retirement deposits may ever be considered as part of the needs analysis in an alimony determination.

2003 UT App 357 ¶15. Then citing Bair, the Court of Appeals said: "[A]n appellate court has a duty to point out, and address, issues which may become material on remand even where a separate issue was dispositive to the resolution of the appeal." Id. So it is with the above three issues. If this Court finds that the record before it is inadequate to make a decision on the above issues, it should remand this case for further proceedings before the trial court, but in doing so—it is clear how the trial court would rule below—this Court must give legal guidance and address these issues. The District cannot be allowed to side step the requirements of the Impact Fees Act by entering into contracts with municipalities and then ignore the plain language of the Act.

3. This Matter is Ripe for Decision.

One of two options must be the case: (1) either somebody cannot get secondary water from Toquerville and therefore they come to the District or (2) the District created its Rules, and then proceeded to file a Petition with the courts seeking declaratory relief for absolutely no reason. The trial court, finding the first option to be more pliable, found that "the Court's determination in this case must assume that someone has applied or will apply to the District for service under circumstances which require the District to make a decision about the application." R. 192.

The District argues that this matter is not ripe for adjudication because Keystone has not asked the District for water, and has neither been asked to nor paid a "pass

through fee." Brief of Appellee, at 26. The District cites several cases to support its position as to when an issue becomes ripe. However, the issue at hand is different than the District's cited cases because those cases were not brought, in part, under Utah Code 17A-2-1442. That statute allows the District to file Petitions seeking declaratory relief allowing a "judicial examination and determination of . . . proceeding or contract of the district, whether or not the contract shall have been executed, including proposed contracts . . . and the petition shall be taken as confessed by all persons who fail so to appear."[5] Thus, if Keystone had done as the District suggests by waiting until it received a bill from the District, the District would be before this Court arguing that it is too late to challenge the fee because the District's petition would have already been "confessed" against Keystone. This matter is ripe for this Court's decision.

C. KEYSTONE SHOULD BE AWARDED ITS ATTORNEYS' FEES.

The District argues that Keystone should not be awarded its attorneys' fees because the matter at hand "was brought by the District pursuant to Section 1442. It was not brought under Utah Code Ann. § 11-36-401." Brief of Appellee p. 32. However, this argument would require this Court to find it possible for the trial court to issue a declaratory judgment on whether or not the District's Rules constituted an impact fee, without taking into account the "Impact Fees Act" of Title 11, Chapter 36.

Furthermore, in addition to Section 1442, Utah Code Ann. § 11-36-101 *et. seq.* is the foundation for both the District's Petition and Keystone's Complaint.

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[5] It is also worth noting that Utah Code Ann. § 17A-2-1442 was enacted in 2000, which is after all the District's cited cases in support of its position.

1. The District's Entire Claim for Relief in its Petition is Based Upon Utah Code Ann. § 11-36-101 *et. seq.*

The District claims that the issue of whether or not their Rules constituted an impact fee, was "not brought under Utah Code Ann. § 11-36-401." Brief of Appellee at 32. This is contrary to the District's own Petition. In fact, the District's entire "Claim for Relief" in its Petition is based upon the Impact Fee Act:

> WHEREFORE, Petitioner requests the court to determine and declare that the "Final Rules and Regulations for Secondary Retail Water Service for the La Verkin Creek Area" as amended on July 17, 2001, do not impose impact fees under Utah Code Ann. § 11-36-101 *et seq.* and that the Rules are within the power of the District and constitute a valid act pursuant to a valid proceeding of the District. (emphasis supplied).

R. 4. Furthermore, Paragraph 10 of the District's Petition further states as follows:

> Utah Code Ann. § 11-36-102(7)(a) states:
>
> "Impact fee" means a payment of money imposed upon development activity as a condition of development approval.

R. 3. Finally, Paragraph 12 of the District's Petition states that the "fees charged by the District under the Rules are not impact fees under Utah Code § 11-36-101 et seq." R. 4. The Trial court clearly disagreed with the District, finding that the "District's availability fee does constitute an impact fee under the Impact Fees Act." R. 193-194 (emphasis added).

Because the Impact Fees Act is the basis of the District's Petition as well as the Trial court's Ruling, Utah Code Ann. § 11-36-401(5), which allows for attorneys' fees under the Act is applicable. Keystone believes that the trial court erred in failing to award Keystone its attorneys' fees. The District filed its Petition against an unknown and

unascertainable number of Respondents. Keystone alone appeared to challenge the District's Petition, and prevailed. It should not be the responsibility of private individuals and/or businesses to force quasi-governmental entities to obey the laws set by the Legislature. Nevertheless, Keystone was forced to do so, and prevailed. For this reason, Keystone should be awarded its attorneys' fees pursuant to Utah Code Ann. § 11-36-401(5).

2. Keystone's Complaint also seeks a Declaration Under Utah Code Ann. § 11-36-101 *et. seq.*

Keystone's Complaint also seeks relief under Utah Code Ann. § 11-36-101 *et seq.*, further supporting Keystone's claim that the trial court erred in failing to award Keystone its attorneys' fees pursuant to Utah Code Ann. § 11-36-401(5). The District attempts to discredit Keystone's claim for attorneys' fees in that "[n]owhere does the complaint cite to 11-36-401(1) or (4) as the basis for Keystone's standing to sue." Brief of Appellee at 32. In making such a statement, the District ignores Keystone's prayer for relief which seeks "a declaration that Defendant's fee is an impact fee subject to the Utah Impact Fee Act," i.e., Utah Code Ann § 11-36-101 et seq. References to Title 11, Chapter 36 of the Utah Code are additionally found in Paragraphs 7, 9, 10, 12, 20, 37, 40, 41, 42c, and 43 of Keystone's Complaint. See Brief of Appellant, Exhibit 1. Keystone's Complaint further prayed for "an award of attorney's fees as allowed by law." See id. at 14. The District's claim that Keystone should be denied its attorneys' fees for failing to specifically cite Section 401 is disingenuous.

The District contends that no "proceedings have been held pursuant to Keystone's complaint." Brief of Appellee at 32. This is simply untrue. Keystone's first cause of action was to seek a declaration that the District's "fee is an impact fee subject to the Utah Impact Fee Act." Brief of Appellant, Exhibit 1 ¶ 43. The trial court's Ruling then found that the "District's availability fee does constitute an impact fee under the Impact Fees Act." R. 191-194.

At the beginning of the trial court's hearing on October 18, 2001, the trial court recognized that there were "a couple of consolidated cases," that being the District's Petition and Keystone's Complaint, which had been consolidated pursuant to an Order to Consolidate. R. 35; R. 357, T. 3:9,10. At the hearing on October 18th, the parties agreed that the hearing would be limited to "the issue of whether or not the fees that [the District has] imposed meet the statutory definition of what is an impact fee." R. 357, T. 4:10-11; see also R. 146. Surely the District does not suggest that the October 18, 2001 Order that limits the issues to "the legal question of whether or not the fee imposed by the . . . District as part of its Rules . . . is or is not an impact fee" means that that issue was decided on the basis of the Petition alone, excluding the first cause of action in Keystone's Complaint. R. 146. The impact fee issue was specifically part of the hearing on October 18th; it was only "all other issues" that were left for later determination. Id. The District's Petition sought a ruling that their fee was not an impact fee. Keystone sought a ruling that the District's fee was an impact fee. The District now attempts to argue that only the District's Petition was at issue as to whether or not the fee was an impact fee. Such logic means that Keystone's position on the impact fee would be

reserved for a later date, even though it was the same issue as found in the District's Petition. Surely it was neither the parties', nor the trial court's, intent to determine whether or not the District's fee was an impact fee, only so that they could all once again determine the same issue at a later date.

Finally, the District argues that Keystone's Complaint "has never been perfected or heard, because the District's motion to dismiss that complaint has never been ruled on." Brief of Appellee p. 32. This is simply not the case in that at the time the District's motion was filed, the trial court had already heard Keystone's Complaint with respect to its first cause of action regarding the impact fees.

The trial court consolidated the District's Petition and Keystone's Complaint, via an Order to Consolidate on September 18, 2001. R. 35. The trial court then had a hearing on October 18, 2001, regarding the District's Petition, and the first cause of action of Keystone's Complaint, as they related of the issue of impact fees. R. 357. The District then filed its motion to dismiss in lieu of an Answer on October 30, 2001. R. 147. Keystone filed its response on November 21, 2001, and the District filed its reply on December 10, 2001. R. 156, 174. The trial court then issued its Ruling agreeing with Keystone and granting relief on Keystone's First Cause of Action on January 15, 2002, thus effectively ruling on the District's motion, rending said motion moot.

IV. CONCLUSION

The trial court's ruling that the District's Water Availability Fee imposed by its Rules is an impact fee should be affirmed. The trial court erred, however, in finding that that fee loses its character as an impact fee if the written authorization for development

activity is granted by another local political subdivision, such as a municipality. Moreover, the District should not be allowed to circumvent the Impact Fees Act by entering into contracts with local municipalities and then washing its hands from what the local municipalities charge for the District's water. If this Court is persuaded that the record is inadequate to rule on these issues, it should rule on what it can and remand to the trial court with instructions and legal analysis on these issues. Finally, Keystone should be awarded its attorney's fees and costs for successfully defending the District's Petition as well as successfully bringing its own Complaint, and should further be awarded its attorney's fees and costs on appeal.

DATED this 12th day of January 2004.

SNOW JENSEN & REECE

Lewis P. Reece, Esq.
N. Adam Caldwell, Esq.
Attorneys for Appellant - Keystone

CERTIFICATE OF MAILING

This is to certify that I caused a true and exact copy of the REPLY BRIEF OF APPELLANT to be delivered via first class U.S. mail, postage prepaid on this 17th day of January 2004, to the following:

Ms. Barbara Hjelle, Esq.
Washington County Water Conservancy District
136 North 100 East
St. George, Utah 84770

Lewis P. Reece, Esq.
N. Adam Caldwell, Esq.

V. ADDENDUM

ADDENDUM NO. 1	Relevant portions of the Transcript cited herein.

Tab 1

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

WASHINGTON COUNTY WATER CONSERVANCY DISTRICT, Petitioner, VS. KEYSTONE CONVERSIONS, LLC. Respondent.	CASE NO. 010501616

BEFORE THE HONORABLE G. RAND BEACHAM

FIFTH DISTRICT COURT

WASHINGTON COUNTY HALL OF JUSTICE

220 North 200 East

St. George, Utah 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PETITION HEARING

OCTOBER 18, 2001

TRANSCRIBED BY: Russel D. Morgan

ORIGINAL

October 18, 2001. St. George, Utah.

PROCEEDINGS

THE COURT: Just now time to move on to the case of Washington County Water Conservancy District and Keystone Conversions, LLC.

(Whereupon, an off the record discussion took place.)

THE COURT: Now, on the water conservancy district vs. Keystone, Hjelle is here for the petitioner, Mr. Reece for the respondent. There, apparently, are a couple of consolidated cases. I have case file for number 1616. And I don't know what this case is about or what you are planning to do today.

MS. HJELLE: Your Honor?

THE COURT: Go ahead.

MS. HJELLE: I think what we have before you today is our petition for a ruling on the initial case which was filed, which is the board of trustees of Washington County Water Conservancy District vs. Keystone Conversions -- no, with Keystone Conversions as respondent. That's why I got confused there. The parties have reached a stipulation that the hearing today would be limited to the issue of whether or not the fees which have been imposed pursuant to a rule that is attached to our petition. And I do have an extra copy for the court of our petition and the exhibits. It is, in fact, an impact fee. The parties have also stipulated that the district has the power to make and enforce all reasonable rules and regulations for the

management, control, delivery, use and distribution of its water. So Keystone has raised some additional issues both in its answer to our petition and in its separate complaint which was consolidated. And I'll (inaudible) characterize it other than I will say they focus primarily on whether or not the actions that we took were in fact arbitrary and capricious or illegal for some other reason. And we have stipulated that those issues can be reserved for later, to be addressed later in the proceedings. So right now before the court is solely the issue of whether or not the fees that we have imposed meet the statutory definition of what is an impact fee.

Fair statement?

MR. REECE: Fair, yeah. Your Honor, did the court -- I had this hand delivered up to the court yesterday morning. You didn't get a copy of the trial memorandum (inaudible)?

THE COURT: Oh, it came in yesterday. I think you can probably make the speech as well as I can now, Mr. Reece, on that sort of thing. So it's not much use to me coming in late like that.

MR. REECE: I think we can go through and outline the issues before the court.

THE COURT: Well, let me make something clear to you. I do not have time to take another case under advisement. If this is an issue that involves materials that should have been provided to me earlier than this so that I would have some idea

in advance what you are talking about, then this hearing will have to be postponed. I haven't had the materials in advance. And I am not in the position to be able to take on another assignment as a case under advisement after hearing some smattering of evidence or argument here. I just don't have time to do it.

MR. REECE: There is a very --

THE COURT: And so if it's something that's narrow enough that it's just simply a matter of some evidence and argument here and a decision, that's fine. But if it involves digesting all of this, no, it's not.

MS. HJELLE: Your Honor, we would certainly submit that it is narrow enough. It is simply a question of looking at the definition of the statute, looking at the black and white language of our regulation and saying, how do they interrelate with one another? Does our regulation meet or not meet the definition of the statute? We would submit that any other arguments and issues raised in the trial memorandum are simply irrelevant to that question.

THE COURT: Okay.

MR. REECE: My response to that, these are very complicated issues. That's why we gave the court the trial memorandum. I apologize they got to the court yesterday morning as opposed to maybe two days prior to the hearing. But the issues are very complicated, as Mrs. -- or Ms. Hjelle

suggests. It's a matter of looking at the regulations, seeing what's happened there. And the exhibits are in connection with their minutes and their hearing both on June 12th and on July 17th, and applying that to the statute. Now, that would take -- that's -- it's complicated. It's not a matter (inaudible) arguments are, that's the end of it. (Inaudible.)

THE COURT: I guess you know my next question, Mr. Reece. What did you think I was going to do with this bound volume when you submitted it yesterday and it was delivered to me yesterday afternoon?

MR. REECE: I hoped that you would have a chance to read it and (inaudible).

THE COURT: When?

MR. REECE: Yesterday afternoon.

THE COURT: Let's be realistic, Mr. Reece.

MR. REECE: The point I'm trying to make to the court is this. We are not going to be able to resolve this. These issues here, filed by the petitioner, were filed for a general hearing on this date. They published notice in the paper. They published in three public places, I guess. (Inaudible) but required by the statute published this notice. Court can take record or note for the record there was no one here except for my clients. And so, as far as between us, we would prefer to continue the matter until the court has time to review the trial memorandum until the court has time to be more prepared

to go through and see what we have here. My point simply is, this is too complicated for the court. It's an issue that undoubtedly will be up on appeal. It's something the court ought to spend some time reviewing. Having not even read the petition for this morning, Your Honor, the court, I think, would be (inaudible) to spend the extra time, read through our common memorandum and (inaudible).

THE COURT: Mr. Reece, notice of this hearing was given two months ago.

MR. REECE: That's correct.

THE COURT: And you filed an appearance more than a month ago. Why is it that you are only filing your trial memorandum fewer than 24 hours before the hearing?

MR. REECE: I'm -- my schedule, Your Honor, and I'm lucky I got it to the court (inaudible) even before the hearing.

THE COURT: Well, I'm not going to consider it for this hearing. It's unrealistic. And it doesn't meet the requirements of the rules. And if that results in what you think is a poor decision and you end up going on appeal and spending your client's money for appeal instead of getting things into the court here on time, I guess that's one way to approach it.

MR. REECE: So the court's (inaudible) review on request?

THE COURT: I don't even know what the matter is other than a little bit that I have heard here.

Now, Miss Hjelle, you say that these are things that are raised by your petition, but what is this process that you are undertaking by this notice of petition and hearing?

MS. HJELLE: Your Honor, under the water conservancy act, which begins at 17(a)-2-1401, there is a provision by which I would refer the court to 17(a)-2-1442. This happens to be a highlighted version. And I have to admit, I didn't make an extra copy. It's just highlighted some of the language. But perhaps that would clarify things for the court. Essentially, we are empowered to bring a petition for what I would call the equivalent of declaratory judgment and an action taken by our board. Well, until we get to the second to the last sentence of this section, it looks like another of the legislature's attempts to create some kind of process in the court without reference to any of the rules of the court. Then it says, "The Rules of Civil Procedure shall govern and matters of pleading and practice where not otherwise specified herein." So from this statute you are taking it that a petition itself can be considered just upon a notice of hearing, the notice of hearing being specified in the statute or at least the notice of filing specified. And there's sort of a backhanded reference to a notice of hearing on the petition, in the way this is phrased. And then, what is the court supposed to do?

Is this a trial? Is it a motion hearing? What is it? You are asking me to guess what the legislature was thinking, if they were thinking at all, when they passed this sort of thing?

MS. HJELLE: I guess -- maybe I'm oversimplifying it. But I think if you would allow me to begin my argument and begin it, see how far I get with it. To me it's --

THE COURT: I'm still wondering about what procedure we are in. Am I being asked to grant a motion or to grant a petition? What do you think the procedure is that we are following?

MS. HJELLE: Yes, you are being asked to grant a petition.

THE COURT: Okay.

MS. HJELLE: May I refer with my client for just one minute? He seems to desire to say something.

MR. THOMPSON: Do you mind if I add to the court and make this a little more informal?

THE COURT: Do you mind?

MR. REECE: I don't mind, Your Honor.

MR. THOMPSON: The reason this was in the water conservancy statute is the district's not just ours, but around the state we are dealing with financing and water contracts and rules that had brought public interest. They had to know that they, in fact, were going to be legal and enforceable, because they were borrowing large amounts of money. They were building

significant infrastructure. And so the purpose of this section was to provide a way that when the board took an action, they could go ask where it was important, ask the court for declaratory judgment that what they had done was either legal or illegal, so that they didn't move forward in an arena on shaky legal grounds. And I think what the legislature, at least my understanding this has always been, that their intent -- and we have used this on a couple of other occasions, particularly in some financing -- what the court -- what the legislature was concerned about is that as you are building in this infrastructure, and the courts have been (inaudible) the water system, that there would be a way that people depending on it knew that the action was final, it was legal and non-appealable so you had some certainty that that action wasn't just a whim of an appointed body, but you had kind of a second look at that, a fairly quick look at it, so that as you move forward making those policies or entering the contracts that you knew they were going to be valid and enforceable. That was the purpose of the statute and the reason that that was in there. And you see it used in districts, particularly seeing it used extensively in the Central Utah Project and other places. And we have used it on occasion rarely.

THE COURT: You mentioned something like a declaratory judgment process.

MR. THOMPSON: Well, it really is a declaratory

judgment. This is what it is. Now, whether we -- you know, we think we followed the statute correctly. That was the intent of the background what's passed. And that's how it's being used in (inaudible) around the state.

THE COURT: Okay. Thank you.

MS. HJELLE: Your Honor, if I may make a couple of other points. And I may not have the citation with me. But there is a section of this statute that is sequential to 1442. I thought I had made copies, but I am having a hard time finding it. Oh, wait. 1444. (Inaudible) 1444. "All cases in which there may arise a validity -- a question of validity," et cetera, et cetera -- I'll skip all this kind of thing. Let's say, "the question shall be advanced as a matter of immediate public interest and concern and heard at the earliest practical moment. The court shall be open at all times for purposes of this part." Secondly, I would like to submit --

MR. THOMPSON: Separation of branches.

THE COURT: I'm not sure that's a concept that exists. At least not in the constitution of Utah.

MS. HJELLE: It's certainly my understanding under a stipulation -- and this is my copy of the stipulation that I signed and returned to opposing counsel. It doesn't have opposing counsel's signature. But I assume there is one.

MR. REECE: There is one. In fact, Your Honor, I've got a -- it should have been (inaudible) by this court.

THE COURT: I think I saw this in the file.

MR. REECE: (Inaudible) signed copy of the order yesterday.

THE COURT: Oh, that's where it was. I received it yesterday with the order. I'm not sure where it is. But I have seen it. Thank you.

MS. HJELLE: It was certainly my understanding that we had a stipulation that the portion of the hearing on whether or not this is an impact fee could go forward today. And, frankly, I'm a little bit unprepared to even hear that there was an objection to having a hearing. I think that -- of course, counsel has the trial memorandum. And maybe that's the reason for it. But --

THE COURT: Well, it says the court shall be open at all times.

MS. HJELLE: (Inaudible.) I don't know if that's good to submit to you or not.

MR. REECE: (Inaudible), Your Honor.

THE COURT: Okay. So you planned then to present oral argument or any evidence also? Or is it really the evidence not in dispute, it's a question of interpretation?

MS. HJELLE: I don't think the evidence is in dispute. I think probably -- obviously, I have Mr. Thompson here if there was some clarity. If we got to that point, I suppose that could be something that can be ruled on at the time. But

my anticipation will be that we would make our arguments and the court would rule on what it could rule on today, and you would make that decision. I mean, if it can't be done, it can't. I still have hope of persuading you that these issues are not that complex, that they are pretty straight forward, that you can make that simple narrow question ruling on that simple narrow question today, and that the rest of the issues raised -- counsel has the opportunity to bring those up to you in oral argument. (Inaudible) convince you that they are significant enough or add some complexity that I don't think is there, then, perhaps, we may need to have a continuance. But I think this could be ruled on today based on the material facts that are before you in the petition and the exhibits.

THE COURT: Okay. All right. Let's go ahead with your presentation then.

MS. HJELLE: All right. Thank you, Your Honor. I appreciate that. I won't belabor the point that we filed a petition. The attachment to the petition, Your Honor, is the final rules and regulations of the secondary retail water service for the LaVerkin Creek area. In addition, there is an engineer's study. And I think I already handed you that, the copy we brought with us today for you on that. At any rate, as I indicated earlier, we think it's a very simple question of looking at the salient, the relevant language. It's a long regulation. But I think we can focus in on the material parts

of the regulation and look at whether those indeed meet or do not meet the terms that make them an impact fee. So I think that's a simple question that we are submitting to you today.

If I could just give you, if I could, some background of why we did this and how we got here. The water district, obviously, is charged with conserving and developing water for the people in Washington County. But we have our ways of doing business. And, under law, we are entitled to determine how we'll go about conserving and developing and providing water. And, fundamentally, the water district is a wholesaler, for lack of a better term. In other words, we do not go out and sell to individuals, individual lots, individual developments even for the most part. We primarily provide water to municipalities. And then they go on and do whatever business they do with it. We primarily do that by way of contractual arrangements and the like. We also have some irrigation companies. And there are some exceptional situations that aren't relevant here today. So we are a wholesaler of waters, is the way I would put that.

In that vane, sometime ago, we entered into an agreement with the town of Toquerville and the Toquerville secondary -- and the Toquerville Irrigation Company to provide a system for secondary water, irrigation water within the town of Toquerville. And to do that, the board was created. And an organization called Toquerville Secondary Water System was

created. And the district financed and constructed the infrastructure and, in order to ensure payment, basically retains title to the infrastructure while payment is being made. But, over time, the intention is that that system would be owned and operated by the town of Toquerville. The board of that entity we call TSWS, is two members are appointed by the water district. Two members are appointed by the town of Toquerville. Then those four members select a water user in Toquerville for a fifth member. So it is dominated by Toquerville. But the district certainly has a voice.

Okay. So that system has been put in place and is now serving within the town of Toquerville. However, it became apparent to us that Keystone Development would be likely coming to the district rather than to TSWS to obtain secondary -- I guess, I mean we are presuming secondary water service within the city limits of Toquerville where we already have this other system in place. So the district basically felt it was appropriate to rationally evaluate whether and on what terms it would ever do something outside of what is already done through TSWS. And that's what these regulations really are. They are the district's attempt to figure out how to respond in a rational way to appending requests that we can see coming in the door.

Initially, when we looked at it, we more or less presumed that this would be an impact fee type situation. And

we started down that road. But, as digging into this and trying to meet the terms of that statute, it became pretty apparent to me that it was something like fitting a square peg in a round hole. Nothing really jived between what we were doing and the terms of that statute. And that's what I would like to focus on before the court right now.

First of all, I would like to give to the court, if I could, a few of the definitions that I think are the relevant definitions from the statute. And, first of all, I would like to focus on the definition of Utah code section 1136-102-7(a) in impact fee. And I think this is the really central part of our argument, Your Honor. An impact fee is a payment of money imposed upon a development activity as a condition of development approval. To really jump ahead of my argument, what we are really telling you is when we get to our regulations -- and I have the salient parts to hand you at that time -- we don't ever have anything in there that says before you can develop you must pay us money or in order to be able to develop you must pay us money. It's not there. So I'll go on from there, Your Honor. It's kind of jumping ahead a little bit.

But, fundamentally, in order for us to impose an impact fee, we must be able to be in a position to approve or disapprove a development activity or be causally linked -- jumping to what I know is in their trial brief -- causally

linked, you could say, to approval or disapproval to a development activity.

Now, the next step, addition I would like to focus on, is number three. Development activity means any construction or expansion of a building, structure, or use, any change in use of a building, structure, or any change in use of the land that creates additional demand and need for public facilities. So, there again, the district must be able to approve or disapprove construction, expansion, change and use of a building, structures, or land to simplify that definition down. Furthermore, it is that, those activities which might -- which would create a demand and need for public facilities. So that leads me to the third definition I would like to focus the court on, which is the definition of public facilities. And if you look at that definition, the -- there are the following capital facilities that have a life expectancy of 10 or more years and are owned or operated by or on behalf of a political subdivision. And I would focus you on subpart (a), which is, includes water supply and distribution facilities, okay, which is essentially what the issue is again, kind of jumping ahead. I wouldn't have brought this up except I know it's in the trial memorandum, and this is the only other issue I could see that would be relevant, in my opinion, from that.

Now, so the facilities in question here, well, I'll skip that, because it really becomes relevant when we look at

our regulation. Okay. But those are the definitions that I think are relevant. So our position simply is that the district is not approving development as defined there. And I would like to look at our regulation now, if I could, Your Honor.

There are two parts to this. And I'll just give them both to you at the same time, if I can get these separated.

(Inaudible) these are just, counsel, out of our regulation, that paragraph five you alluded to in your memo and it's attached exhibit.

Your Honor, I would like to first focus on Exhibit A. This is a fee structure. And this is the exhibit that sets forth, when -- what triggers the imposition of the fee, for lack of a better way of putting it.

Okay. Now, looking at Exhibit A, paragraph one, the initial water availability fee is due and payable when the developer requests water service. Okay. Now, as far as we are concerned, as a water district, he could have a subdivision approved, he could not have a subdivision approved; he could have his plat drafted, he could not have his draft platted. It's his decision when he comes in and asks us for water service. I could speculate, for example, that a developer might say, I want a subdivision. I don't want to go to TSWS. Instead, I want to get my water from the water district. And before I even start platting out my subdivision, I want to

address.

Okay. So, at that point, that's when they make that request. Now, what is the water availability fee? Well, this is not an involuntary thing that we have control over. This is, once again, a situation where for some reason someone wants to voluntarily come to us and wants us to voluntarily provide them with water; at which point, we forego opportunities to market that water elsewhere. We forego opportunities to utilize our pipes. We can take water in our pipes all over the county ultimately. I mean, I'm simplifying it down. But, fundamentally, when we put a pipeline in place, it has a certain capacity, and somebody comes to us and asks for water, and we say we will give you water. Go ahead and make your plans on that basis. We've got to reserve that water in some way. And we have devoted facilities regardless of whether they are already in place or they intend to build them, we are reserving the water, we are reserving, you know, planning infrastructure and so forth. I don't think that's the same thing as what's referred to as an impact fee.

Now, then again, I would like to reiterate the point that it's all voluntary. Okay. I would also like to point out to the court while we are on this point, that we think that this type of arrangement is mandated by another section of water conservancy district statute, section 17(a)-2-1432. And perhaps without belaboring the point, it talks about the need

what I presented to you is what we do with regard to -- I mean, our regulation states that there is nothing lurking out there with regard to TSWS. I do have the contract but, fundamentally, it's just a water system that's managed by that board. And we don't have any approval or authorities that aren't -- and I guess I think, still, that's pretty irrelevant because, once again, it comes back to somebody not wanting to go through any of those other routes, whatever they may be, out in the world for doing their business. Do they want to come to us and ask us for service which we, fundamentally, are not desiring to provide given the resources that we have to provide for other obligations to the public. So --

All right. Now, I would just like to go back to Exhibit A, if I could, Your Honor. Number two is a standby fee. That is due and payable after construction of additions to the system. I guess without, I haven't highlighted these or separately set forth these provisions of the regulations. But the regulations basically provide that if you wanted to connect to our system and get water from us in this secondary irrigation water, then you got to meet our standards in constructing your pipes. And you got to have our engineer look it over and so on, so forth. And then we own it. So, essentially, as folks come and say we want to be part of your system, we are saying, fine. Pay the water availability fee. And you look over our standards. And you construct at some

point, whenever. That's at their discretion when they do it. At some point you construct the pipes, you meet our standards, then you start paying the standby fee once we have approved the construction and the addition of the pipeline system to our system.

Paragraph two of our regulations indicate that if a community is unable to provide that water service, they have to submit a letter asking for it. So there is a written request. That really relates back to paragraph one of Exhibit A, I think.

THE COURT: Um-hmm.

MS. HJELLE: Item number three in Exhibit A is a connection fee of $400 per lot. Then, thereafter, a water service fee, which is related to actual service of water. So you switch from a standby fee to a higher fee that reflects the fact that you are now hooked up to the system and receiving water. So that's it. None of these fees, clearly, are conditioned upon approval of development, of a development (inaudible). It simply isn't part of the deal.

Now, I would like now to refer to the other little page that I had handed you, which is actually an excerpt from the regulations. It is paragraph five from those regulations. And, again, I mention that I allude to this because I was alerted to the argument by the trial memorandum of counsel. And to make an attempt to state their argument, they are

basically saying that if you look at the last phrase there, that they have to pay the appropriate fees prior to construction of any intended additions to the district system. Now, they could construct other irrigation systems that aren't going to connect to ours. We have nothing to do with that. Or connect to TSWS or whatever. But if they are intending to connect to our system through this process that's outlined in these regulations, then they have to sign these water application and agreements for each lot, which provides some legally binding ability for us to collect what we need to collect and manage it in the way we need to manage it.

The argument, as I understand it, is that somehow makes this an impact fee because there is a required approval prior to that construction. But this takes us back to the definitions page that I initially argued from. It starts at the top 11-36-102 definitions. This gets back to the definition both of public facilities and development activity and development approval. This kind of ties it altogether. These pipes that are referred to in that paragraph five are not development activities. They are the public facilities that the development activities cause a need for, if you see where I'm going. So we are still not approving a development activity. These folks are engaging in development activity however they choose to in accordance with whatever approvals and regulations other entities have authority to grant or not

grant. Or, when they come to us and want to connect to our system, then they are adding an infrastructure to our public facility. And we are saying that becomes part of our public facility. It will meet our standards and we will approve that. But it's entirely different from a development activity. So that's why we don't think that argument has any merit when it arises.

I guess, Your Honor, I've got a couple notes here about the brief. I think maybe I'll just summarize those by saying that we think those are (inaudible) facts. We simply don't think what other water districts do in other situations, what Toquerville does in its culinary water system, what other municipalities do in their culinary water systems, what the district might do in some other situation under separate contract or whatever it might be are relevant. We think the relevant question is, what does our regulation say and what does the statute say, and have we in fact made some payment of fee a condition of development approval. And we submit to the court that we have not. And, therefore, it is a simple matter to rule that this is not an impact fee. Thank you, Your Honor.

THE COURT: What's the consequence if it is an impact fee?

MS. HJELLE: If it is an impact fee, we would do something somewhat different from what we have done here. There are more formalities. And this gets back, Your Honor, to

my befuddlement in trying to meet the impact fee statute. You have to do what's called a capital facilities plan. And just to give you an idea of why I ran into trouble as counsel for the district, you have to do both a capital facilities plan and an impact fee analysis. There are two requirements. And you go through some specific procedures of notice and the like and hearings and the like. So that simplifies it. But there are -- it is a strict procedure, for lack of a better term. There are outlined procedures. What we have done in this instance is, we have done an analysis. We had our engineer do an analysis which might be similar to what an impact fee analysis would be. And I know that counsel would tell you that they were critical of that, that it was not sufficient to meet the standards of the impact fee analysis. And that could, theoretically, be an issue if this were an impact fee. And we don't have a capital facilities plan which is also required.

Now, okay. If the court would indulge me for just one moment here. Before imposing impact fees, each local political subdivision shall prepare a capital facilities plan. The plan shall identify demands placed upon an existing public facilities by new development activity. I look at that. And I say, well, gosh. I don't know how to do that for the water district because we have existing contracts. And we have big pipelines we are going to build. And we are going to sell water under contracts to municipalities. And they are going to

deal with the development within their borders, boundaries. We aren't directly relating what we do to development activity as defined in this statute. So I was very befuddled as to how we could forecast these kinds of things which we have no plan of doing.

The set apart is the proposed means by which the political subdivision would meet those demands. Same thing. City of St. George is trying to figure out how to meet the demands of the development which it approves within its boundaries. We are trying to figure out how to build reservoirs, how to make, put pipelines in place that will deliver quantities of water that St. George, at some point in time, would ask us to deliver to them.

So, we have no plans of, you know, again, looking at the definition of development activity, looking at what buildings are going to be built, what structures are going to be built and so forth. That we leave to those we can contract with. That's a little (inaudible) from what you asked. But, fundamentally, getting back to the question you asked, there are procedures that are more elaborate.

THE COURT: Okay.

MS. HJELLE: And I guess to add one more point, if I could, so we believe that our duty in passing this fee under our water district statute is to be rational, I mean, is the standard that applies to governmental entities in the actions

that they do. We can't be so irrational that it would be appropriate for a court to come in and substitute its judgment for the judgment of our court. Thank you, Your Honor.

THE COURT: Okay. All right. Mr. Reece.

MR. REECE: Thank you, very much, Your Honor. If I can just really carefully focus with you on these definitions --

THE COURT: Um-hmm.

MR. REECE: -- because I think that's where this case really comes down, at least the issues what's before the court today. And I'm not going to use the exhibit that Mrs. -- or that Miss Hjelle produced, because I think these are a few definitions that I think are applicable that are not included in there. I'm looking at page 440 of volume one of the code. I don't know if you have that, if the court has the new ones, the 2001?

THE COURT: No. We have the 2000 in here today. They will be gone by tomorrow.

MR. REECE: You know what, could I trouble the court (inaudible) photocopies of that?

THE COURT: Let's see. What section are you looking at?

MR. REECE: Section Utah Code 11-36-101 and 102 -- I'm sorry 101 and 201.

THE COURT: Have they been changed since 2000?

MR. REECE: I guess not. Sorry. (Inaudible) been modified. I believe they are the same, Your Honor. So I guess we are okay (inaudible).

THE COURT: All right.

MR. REECE: Looking first at section 11-36-201 subpart (1)(a), states that, "Each local subdivision shall comply with the requirements of this chapter before establishing or modifying any impact fee." You pop over to 101, just a couple paragraphs before that, 101.

THE COURT: It's 102, isn't it, where all the definitions are? 101 is just the title.

MR. REECE: Yeah, I apologize. 101 -- 102, subsection (8) (a). It states that, "Local political subdivisions means a county, a municipality or a special district created under title 17(a) special districts." Now, part of the argument that's being advanced here today is because Washington County Water Conservancy District is a special district, they don't approve or disapprove development activity and, therefore, they don't come within the meaning of the impact fee statute. The fact the statute itself includes them within this definition, and suggests that the legislature, when they created this statute, believed that special districts could in fact approve or disapprove a development activity. Now, if you'll look up on subsection (7)(a), this is the citation of Miss Hjelle cited earlier. States, "An impact fee means that payment of money

imposed upon" -- I'm going to put in quotes, "development activity" as a condition of" -- I'm putting quotes again, "development approval."

Now, those sections of the code, development approval states, means any written authorization from a local political subdivision -- that would include a special district -- that authorizes the commencement of development activity. Doesn't say to give final plat approval or to give plat approval or give even preliminary plat approval. It just says that authorizes upon -- sorry, written authorization from a political subdivision that authorizes commencement of a development activity. Now, subsection (3) above that states that, "Any development activity means any construction or expansion of a building, structure, or use; any change in use of a building or structure; or any changes in the use of the land that creates a (inaudible) demand and need for public facility." So we are not in a situation here where we have to come to the board of the district and say will you please give me subdivision approval so I can put in this water facility. That's not what the statute requires. It says if you have to pay a fee before you can go ahead with any development activity, that fee then, by definition, if it is paid to a political subdivision, which would include specifically include a district, service district, that fee is an impact fee.

And as a result of that, you have to have a capital

facilities plan. And the court, I'm sure, is very much aware of capital facilities plans. Every political subdivision has them. They are detailed. They show what they cost to build their structure. What do they have right now? What does it cost to build the duct right now? I might add, in my trial memorandum -- trial brief, the Weber Water Conservancy District has its capital facilities plan with their impact fees and their impact fee analysis. The Ash Creek Service District has a capital facilities plan with their fees. Service districts, water districts, whether it be Weber, Washington County, it doesn't matter, they oftentimes do have fees they impose as a condition of commencement of a development activity. And, again, that does not mean final plat approval or preliminary plat approval for a development. It just means that if you want to put in a system for secondary water and use us, you got to pay a fee before you put that system in, which is exactly what these regulations require.

Now, if I can, further, the other paragraphs that I think are relevant here, Miss Hjelle pointed to paragraph 11 of 102 -- 102, yeah, about public facilities. And that talks about, specifically, only the following capital facilities that have a life expectancy of 10 or more years, and are owned or operated by or on behalf of a local political subdivision; namely, water supply and distribution facilities. Well, if you read through their regulations, when we put in these

are asking us to pay for the entire costs of those facilities. That's why that's different. That's why it comes within the purview of the impact fee statutes, Your Honor.

THE COURT: Well, go ahead and continue. I would like to see the connection of the system improvements.

MR. REECE: Even if you just look at strictly the public facilities part of that, Your Honor, they are asking us to put in water, it will affect, and then they will then own the water rights, the water supply, treatment, and treatment facilities. It comes squarely within paragraph 11(a) in any event. And I think what's kind of ironic about this whole thing, Your Honor -- hang on a second, here -- and I'll submit this to the court, is there is a special agreement that the water district has with my client that they will in fact produce the water for my client, supply the water for my client, not the TSWS or anybody else, that they will provide that water on the benefit -- on behalf of my client. I hand you what's been marked as an agreement --

MS. HJELLE: Your Honor, I would like to object to this. I don't see how this agreement is relevant to the question of whether our regulation meets the definition of an impact fee. I think you are opening up a whole new area that has nothing to do with the petition and the issue before the court today.

THE COURT: What is the connection, Mr. Reece?

MR. REECE: This specifically requires them, or requires them to produce water for my client. Part of our argument is we don't have to produce the water unless you request it. Well, that's inaptable to my client. They are required to produce the water for my client.

MS. HJELLE: Your Honor, there are issues of this -- I mean, first of all, is irrelevant. I mean, even if we had some obligation, which we are prepared to deal with this fully, and I think this really relates to the issues of their complaint that we stipulated would be addressed at a later date. We are fully prepared to address this, but -- I don't know. You know, it's just not relevant to the question of whether we have an impact fee. Assuming their argument is correct, and we had some contractual obligation, which we do not, to do that, first of all, we have TSWS. And we have fulfilled that. But, secondly, it's still a voluntary situation that they entered into by contract. It's not the kind of situation that is relevant to the question of whether our regulation, which is not solely focused on them, admittedly, a response to an anticipated request from them. But it is a broadly applicable public regulation of the water district. This contract is a separate issue.

MR. REECE: It's specifically against the issue of whether they say, well, you want water, it's request for fee. It's not. We need to get the water from them. They know that.

regulations on how we put that secondary system in. What pipe we use, whether the Ash Creek Service District is going to be involved as well. Whether we put the right thickness of pipe or whatever. They have a whole litany of requirements we have to comply with before we can go through and get that final plat approval. Now, whether the Toquerville -- even if, Your Honor -- hold your thought (inaudible) -- but even if we didn't have to pay Washington County Water Service District, that was a pass-through fee to Toquerville Secondary Water System, that doesn't lessen the fact that it's a condition of development activity.

THE COURT: Well, I think what I'm getting from your argument is a little bit different interpretation of the terms "development activity" and "development approval."

If I can state your argument the way I understand it, you say you are being required by the district to pay money. You say that is imposed upon your development activity. You say that that development activity is the creation of a subdivision. You say that the city or town -- which is it, Toquerville?

MR. REECE: It's a city now.

THE COURT: City? You say that the city requires you to have these public facilities in in order to have, to get the city's authority to commence your development activity, which is development of the subdivision, and, therefore, since the

development approval is a written authorization from a local political subdivision, which is the city, to authorize your development of a subdivision, and that development of the subdivision creates the need for public facilities, then the fee imposed by a second political subdivision is still just necessarily an impact fee even though that second political subdivision, the water district has nothing to do with approving your development at all. Of course it approves the construction that connects to its own facilities.

MR. REECE: Sure.

THE COURT: You wouldn't expect someone to be able to say I need some electrical power and I'll tell Utah Power & Light -- in the olden days -- how I'm going to hook it up, and they'll just have to like it or lump it. You'd have to comply with everything Utah Power & Light requires back in those days. So is that what you are saying, Mr. Reece?

MR. REECE: In essence, when they -- when the district says to us, okay, put in a secondary system, you have to do this, this, and this, and you need to pay us this water -- I forget how they call it, this water application fee, before you can begin that and follow our regulations on what you put in there, that is part and parcel of the whole development process. And it doesn't matter whether we have to have that as a condition of final plat approval or not. If we come back even at a later time and say, okay, maybe now we want to put in

position to do anything about it. All right.

Miss Hjelle, what's your final argument on this?

MS. HJELLE: Your Honor, I don't want to belabor. I think most of the points that Mr. Reece raised were addressed in my original argument.

I would like to just articulate one point in particular. The issue of the fact that local districts are -- special districts are referenced in the impact fee statute. We recognize that there could be circumstances under which we would have to do an impact fee analysis and capital facilities plan. Those would be circumstances where there is, for lack of a better term, a causal relationship between the approval of development activity and some action that we have to agree to do. And in the examples that Mr. Reece has given you, are exactly on point. You take Ash Creek Special Service District, the municipalities or the areas where they provide service, obviously, you have to have a sewer facility of some sort to get a building permit. And so they are contractually connected with the areas where they provide service that they will do that. And so they are going to impact the causal relationship. And there you get the impact fee analysis connection. If we voluntarily put ourselves in that position with regard to that there's -- that our service is required in order to get development approval, that would be a different situation. But we haven't done that here.

Toquerville has a separate way of providing all of these things. It has nothing to do with us except in so far, you might say, as our indirect link with TSWS. And even there, Your Honor, it is not a direct link because Toquerville requires, as I understand it, that a developer place the pipes in the ground. That it does not require a connection to receive water. So even there, the question of coming to us and asking for water would still be a step removed from any approval development activity. But there again, there is no linkage between the development approvals issued by the city of Toquerville in anything we are doing in these regulations that are before you today. They simply have no relationship to one another. And these other cases that he has brought up are cases where there is a relationship.

THE COURT: So, but you are -- you are then contemplating a possibility where there are two local -- what's the term -- local political subdivisions involved, and one's approval of a building permit is conditioned on another's approval of a sewer hookup and, therefore, the fee for the sewer hookup should be determined to be an impact fee?

MS. HJELLE: I think there are circumstances that have to be dealt with on their own merits. And we certainly aren't saying there aren't circumstances where we wouldn't potentially have to do something like that. We, obviously, don't think this is one of them. We think this is, obviously, on its face,